IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 637

NORTHEASTERN PENNSYLVANIA NATIONAL BANK & TRUST COMPANY, EXECUTOR UNDER THE WILL OF CLARENCE C. YOUNG, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MILTON I. BALDINGER
608 - 13th Street, N.W.
Washington, D. C. 20005

DONALD J. FENDRICK
819 Northeastern
Pennsylvania National
Bank Building
Scranton, Pa. 18503

Attorneys for the petitioner, the Northeastern Pennsylvania National Bank & Trust Company

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on July 19, 1966.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court is reported at 235 F. Supp. 941 (M.D. Pa. 1964). The opinion of the court of appeals (App. A, *infra,* pp. 1a-23a) is reported at F. 2d .

JURISDICTION

The judgment of the court of appeals was entered on July 19, 1966. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the right in a widow to receive from a testamentary trust of her husband the sum of Three Hundred dollars ($300.00) per month for and during the period until his youngest child reaches the age of eighteen years, and thereafter the sum of Three Hundred Fifty dollars ($350.00) per month for and during the rest of her natural life, with the power to appoint all the remainder of the trust, qualified for the marital deduction as a "specific portion" of the trust within the meaning of Section 2056(b)(5) of the Internal Revenue Code of 1954.

2. Whether the provisions of Section 20.2056(b)(5) of the Treasury Regulations on Estate Tax (1954 Code) defining "specific portion" of the entire interest in property as a fractional or percentile share of such interest are in conflict with Section 2056(b)(5) of the 1954 Code and therefore invalid.

3. Whether, by use of a prescribed Treasury Department actuarial table, the present value of the "specific portion" of the trust can be feasibly computed in order to arrive equitably at a value to be used for estate tax purposes.

STATUTES AND REGULATIONS INVOLVED

Sections 2056(a), (b)(1), (b)(5), and (c) of the Internal Revenue Code of 1954 and portions of Treasury Regulations (1954 Code), §§ 20.2056(b)-5(a), (b), (c), (d) and (f) are set forth in App. B, *infra*, pp.

24a-32a. The most pertinent portion of the statute, § 2056(b)(5), provides that:

> [i]n the case of an interest in property passing from the decedent, if his surviving spouse is entitled for life to all the income from the entire interest, or all the income from a specific portion thereof, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire interest, or such specific portion (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the interest, or such specific portion, to any person other than the surviving spouse * * *

the interest or such portion thereof shall qualify for the marital deduction.

STATEMENT

Clarence C. Young (the decedent) died testate on May 3, 1958, survived by his wife and four children. His last will and testament named the petitioner as executor and trustee of the estate. Item 6 of the decedent's last will and testament provides as follows:

> I give, devise and bequeath one-half (½) of all the rest, residue and remainder of my estate, whatsoever and wheresoever the same may be, both real and personal, to which I may be entitled, or which I may have the power to dispose of at the time of my death, unto my Trustee hereinafter named and designated, to have and to hold the same in trust, nevertheless, as hereinafter provided.
>
> (a) I direct that my Trustee pay out of the said income and corpus of the said estate unto my wife,

Beatrice O. Young, the sum of Three Hundred dollars ($300.00) per month for and during the period until my youngest child reaches the age of eighteen years, and thereafter I direct my Trustee to pay to my wife, Beatrice O. Young, the sum of Three Hundred Fifty dollars ($350.00) per month for and during the rest of her natural life.

(b) If my wife survives me, she shall have the power, exercisable by Will, to appoint to her estate, or to others, any or all of the principal remaining at the time of her death. If my wife fails to appoint the entire principal to her estate or to others as above authorized, then upon her death (or if she predeceases me, then upon my death) any principal remaining at that time shall be paid over to my children on the same terms and conditions as under Item 7 of this my Will.

The vlaue of the testamentary trust passing under Item 6 of the decedent's will was $69,245.85, which was listed on the estate tax return by the taxpayer (petitioner) as qualifying for the marital deduction pursuant to Section 2056 of the Internal Revenue Code of 1954. The value of the property passing outside the will, to the decedent's spouse, $41,751.02, was combined on the estate tax return with the full value of the testamentary residuary trust, $69,245.85, to total $110,996.87. The adjusted gross estate was $199,749.96, and the taxpayer (petitioner) claimed a marital deduction in the amount of $99,874.98, constituting one-half of the adjusted gross estate. The Government eliminated the full value of the testamentary residuary trust from the marital deduction as claimed and thus decreased the amount of the allowable marital deduction to

$41,751.02. The resulting deficiency in estate tax was paid, a claim for refund was disallowed, and this suit for refund was instituted in the District Court.

The District Court decided that the entire value of the trust corpus, $69,245.85, could not be considered for the marital deduction. Instead, it decided that the taxpayer (petitioner) was entitled to deduct as a marital deduction the value of the present worth of the surviving spouse's monthly stipend. The value arrived at, $63,663.43, which was based upon a Treasury Department actuarial formula, was added to $41,751.02, the value of the property passing to the surviving spouse outside the will, to total $105,414.45, an amount in excess of one-half of the decedent's adjusted gross estate, $99,874.98, the maximum allowable statutory marital deduction. The District Court thus concluded that the taxpayer (petitioner) was entitled to the full marital deduction of $99,874.98, and judgment was entered awarding the refund plus interest.

The Government, thereupon, appealed the case to the Court of Appeals for the Third Circuit, which Court reversed the decision of the District Court, three judges dissenting. The Third Circuit ruled that the value of the specific portion from which the wife would be entitled to all the income for life was not acceptably computed. It held that the specific portion need not be a stated fractional or percentile share, but that it is necessary that it be feasible to compute the amount of the specific portion, which, it felt, could not be done in this particular case.

REASONS FOR GRANTING THE WRIT

1. The instant decision is in direct conflict with the decision of the Court of Appeals for the Seventh Circuit in *The Citizens National Bank of Evansville* v. *United States,* 359 F. 2d 817 (March 31, 1966) which case was referred to in the majority opinion of Judge Forman in the instant case (F. 2d at) wherein he stated his awareness that the three judge panel of the Seventh Circuit, one judge dissenting, had recently expressed contrary views, thereby creating a direct conflict.

The facts of the two cases are substantially identical. In both cases a decedent created a residuary trust under which his surviving spouse was to receive a fixed dollar amount per month payable either out of income or corpus, and with a general power of appointment in the surviving spouse over the remainder of the trust estate at her death. The question in each of the two cases was whether the trust was entitled to a marital deduction under Code § 2056(b)(5). In the instant case, the Third Circuit, sitting *en banc,* denied the claimed deduction, three judges dissenting. By contrast, in *The Citizens National Bank of Evansville* v. *United States,* the Seventh Circuit allowed the deduction, one judge dissenting. The Seventh Circuit held that the qualifying specific portion of the trust corpus could be computed by capitalizing the widow's fixed monthly payment at an annual yield of 3½ percent. The Third Circuit, however, concluded that no method of computation could feasibly compute the amount of the specific portion in that particular case.

It is essential that the Court review the decisions of the two lower courts in order that the tax laws of the United States may be uniformly applied.

2. Clearly, the questions presented are of importance in the administration of the Internal Revenue laws. Congress enacted Code § 2056 permitting the marital deduction in order to equalize the effect of estate taxes in community property and common law jurisdictions. *United States* v. *Stapf*, 375 U.S. 118, 128; *Jackson* v. *United States*, 376 U.S. 503, 511. § 2056(b)(1), (b)(5) was later enacted to permit the marital deduction benefit where a decedent created a trust in favor of his surviving spouse whereby she would be entitled for life to all the income from the entire interest, or all the income from a specific portion thereof with a general power to appoint the entire interest, or such specific portion. Where such a marital deduction is allowed, the effect is to defer the estate tax on that property interest until the death of the surviving spouse, at which time such property interest would be included in that person's gross estate for tax purposes.

The disallowance of the marital deduction in this particular case enables the Government to defeat the intention of Congress. § 2056(b)(5), as enacted, does not define the term "specific portion", whereas the Treasury Regulations § 20.2056(b)-(5)(c) of the 1954 Internal Revenue Code defines specific portion as follows:

> "A partial interest in property is not treated as a specific portion of the entire interest unless the right of the surviving spouse in income and as to the power constitute a fractional or percentile share of a property interest so that such interest or share in the surviving spouse reflects its proportionate share of the increment or decline in the whole of the property to which the income rights and the power relate."

Nowhere in § 2056(b)(5) of the Internal Revenue Code of 1954 (26 U.S.C. 1958 ed., Sec. 2056(b)(5)) or in its legislative history (S. Rep. No. 1622, 83rd Cong., 2d Sess., p. 125 3 U.S.C. Cong. & Adm. News (1954) 4621, 4758); H. Rep. No. 1337, 83rd Cong., 2d Sess., p. 91 (3 U.S.C. Cong. & Adm. News (1954) 4017, 4018)), is the term "specific portion" so narrowly defined to mean a "fractional or percentile share" of a property interest. If such was the intent of Congress, it is reasonable to suppose that it would have used such words in § 2056(b)(5) rather than the broader term "specific portion". The Second Circuit Court of Appeals in *Gelb* v. *Commissioner,* 298 F. 2d 544 (1962), agreed, wherein it stated at p. 551, "[T]hat Congress gave a fractional interest as an example of a 'specific portion' does not warrant a construction that Congress did not mean to include other instances fairly within the language and the underlying policy. We *disapprove* Regulations . . . § 20.2056(b)-5(c) insofar as it would limit a 'specific portion' to a 'fractional or percentile' share" (emphasis added). This language was subsequently adopted and referred to by the District Court in the instant case, 235 F. Supp. at 946, and by the Seventh Circuit Court of Appeals in *Citizens National Bank of Evansville* v. *United States,* 359 F. 2d at 821. In *Gelb,* the Second Circuit further stated, ". . . Congress spoke of a 'specific portion', not of a 'fractional or percentile share', and nowhere indicated any policy that deductibility of a 'specific portion' should be governed by the possibility that the spouse's portion will change in value relatively more or less than the clearly nonqualifying part."

It is of interest to note that there appears to be an inconsistency between the regulation involved in the

instant case and Section 20.2056(b)-6(e)(1) of the Treasury Regulations on Estate Tax[1] which deals with the marital deduction on life insurance payments. There is a different wording in Section 20.2056(b)-6 (e)(1) which tends to relax the application of the Code to insurance, as opposed to other property, where it should be equally relaxed.

It is of importance in the administration of the tax laws that the Supreme Court review the cases as pronounced by the lower courts, and the Treasury Regulations prescribed by the Government in order to insure that the legislative intent of the Congress is carried out.

3. The decision of the court below is believed to be erroneous and the conflicting decision of the Seventh Circuit Court of Appeals in *The Citizens National Bank of Evansville* v. *United States* correct. The court below, while not specifically ruling that the Treasury Regulations were void, stated that "it was unable to conceive of a method to compute the 'specific

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[1] § 20.2056(b)-6 *Marital deduction; life insurance or annuity payments with power of appointment in surviving spouse.*

(c) Applicable principles. (1) The principles set forth in paragraph (c) of § 20.2056(b)-5 for determining what constitutes a "specific portion of the entire interest" for the purpose of section 2056(b)(5) are applicable in determining what constitutes a "specific portion of all such amounts" for the purpose of section 2056(b)(6). However, the interest in the proceeds passing to the surviving spouse will not be disqualified by the fact that the installment payments or interest to which the spouse is entitled or the amount of the proceeds over which the power of appointment is exercisable may be expressed in terms of a specific sum rather than a fraction or a percentage of the proceeds provided it is shown that such sums are a definite or fixed percentage or fraction of the total proceeds.

portion' of the trust corpus. . . ." This decision was based upon the erroneous assumptions that there are too many variables involved in order to accurately compute such a present value, and that the time of the decedent's death is not the appropriate time at which to make such a determination to qualify a "specific portion" for the marital deduction. The marital deduction can be taken only once, at the time of the decedent's death, and there is no appropriate time other than the date of death, at which to compute the valuation necessary to permit the deduction. This position is emphasized by dissenting Judge Ganey.

It should be noted that the formula used by the District Court, which was rejected by the Third Circuit Court of Appeals, was one prescribed by the Treasury Department in its Regulation on Estate Tax § 20.2031-7. The use of actuarial tables, such as the one employed, has been widely used for Estate Tax purposes by the Commissioner and by taxpayers and is a reasonable method by which one can place a present value on interests such as the one presented by this case. The extent of such use is clearly set forth in footnote 7 of the *Gelb* opinion, 298 F. 2d at 551, which reads as follows:

> The use of life expectancy tables was sanctioned by the Commissioner in the 1863 edition of "Boutwell's Manual" at p. 203, in the context of a group of regulations which, according to Carlton Fox, "appear to embody the first that were promulgated in respect of taxes on legacies." Since the federal succession tax enacted in 1862 was an inheritance tax, see Warren & Surrey, Federal Estate and Gift Taxation (1961 ed.), p. 2, it was necessary to value legacies individually, and for that purpose the 1863 regulations provided that

remainders and life annuities should "be estimated by Carlisle's, or other approved tables of life annuities." As the regulations grew more elaborate, the Commissioner added examples to aid in applying the life tables "in ascertaining the values of life and reversionary interests," Instructions Concerning the Tax on Legacies, Distributive Shares, and Successions, pp. 24-25 (Series 7-No. 3, 1878). The change to the estate tax concept in the Revenue Act of 1916, c. 463, 39 Stat. 756, and its immediate successor, the Revenue Act of 1918, c. 18, 40 Stat. 1057, was accompanied by contemporaneous acceptance of the use of life expectancy tables to value "annuities, life, and remainder interests," art. 20, Regulations 37 (1919 ed.).

Introduction of the charitable deduction to the estate tax in § 403(a)(3) of the 1918 Act, 40 Stat. at 1098, led to instant acquiescence in the use of mortality tables to value charitable remainders, art. 53, Regulations 37 (1919 ed.). Perhaps their most frequent use in this area is to compute a gift to charity made subject to a life estate, see Merchants National Bank v. Commissioner, 320 U.S. 256, 259 [31 AFTR 753] fn. 6 (1943); Commissioner v. Estate of Sternberger, 348 U.S. 187, 190-192 [46 AFTR 976] (1955). The Supreme Court has even gone so far as to compel their use for such a computation when the life tenant had died before the case came to the Court, Ithaca Trust Co. v. United States, 279 U.S. 151 [7 AFTR 8856] (1929). See generally 4 Mertens, Law of Federal Gift and Estate Taxation (1959), § 28.30.

Other uses of mortality tables in Federal taxation are manifold. A typical application under the estate tax occurs if a vested remainderman dies before the life beneficiary, William Korn, 35 B. T. A. 1071 (1937). For purposes of the gift tax, they are used to value gifts of remainders, Henry F. duPont, 2 T. C. 246 (1943); Betty Du-

maine, 16 T. C. 1035 (1951), and of life estates and annuities, F. J. Sensenbrenner, 46 B. T. A. 713 (1942). They have long been utilized to value annuities, not only for estate and gift tax purposes, but to allocate between return of capital and incremental return for income tax purposes. See GCM 8826, C. B. IX-2, p. 194 (1930); Florence L. Klein, 6 B. T. A. 617 (1927); Guaranty Trust Co., 15 B. T. A. 20 (1929); Estate of Sarah A. Bergan, 1 T. C. 543 (1943). They are used also to derive the "adjusted uniform basis," the 1954 Codes' way of splitting basis between life tenant and remainderman in the event, for instance, either wishes to sell his interest while both are still alive. See Regs. § 1.1014-5(a)(1); 3A Mertens, Law of Federal Income Taxation (Zimet & Weiss rev. vol. 1958), § 21.71, at p. 200.

The Second Circuit in *Gelb,* in referring to actuarial formulas, 298 F. 2d at 551, stated "the use of actuarial tables for dealing with estate tax problems has been so widespread and of such long standing that we cannot assume Congress would have balked at it here; the United States is in business with enough different taxpayers so that the law of averages has ample opportunity to work."

The "variables" which the Third Circuit referred to should not be taken into consideration in the calculation of the value of the "specific portion". This is because the marital deduction *is* taken only once, at the death of the testator, and we can only concern ourselves with what is its value and not with what will happen. It is therefore unreasonable to assume that the method used by the District Court in calculating the specific portion is inconsistent or irreconcilable with the statutory requirement.

CONCLUSION

We submit that the intent of the Congress in enacting Section 2056(b)(5) of the Internal Revenue Code to provide a marital deduction is frustrated by the ruling of the majority of the Third Circuit in this case. Under its approach the estate is subject to an additional "tax bite" and upon the death of the widow the balance in the trust will also be subject to a "tax bite". Congress did not intend this whip-saw.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MILTON I. BALDINGER
DONALD J. FENDRICK
Attorneys

October, 1966